FILED
JUN 22 1995
OFFICE OF THE CLERK

(2)

No. 94-1943

In The

Supreme Court of the United States

October Term, 1994

VICTOR ALEXANDER, M.D.,

Petitioner,

versus

LOUISIANA STATE BOARD
OF MEDICAL EXAMINERS.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

L. THOMAS STYRON (17821)
ADAMS AND REESE
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Attorney for the Louisiana State Board of Medical Examiners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-7831

BEST AVAILABLE COPY

52pp

ISSUES PRESENTED

1. Whether the Board acted within its discretion in declining to admit into evidence five (5) defense exhibits proffered by the Petitioner relevant solely to the criminal defendant's guilt?

2. Whether the Board's decision must be overturned as a result of the alleged impermissible influence of the prosecuting attorney on the Board in its consideration of this case?

3. Whether the disciplinary action imposed by the Board in this matter was violative of the double jeopardy clause of the Fifth Amendment to the U.S. Constitution?

TABLE OF CONTENTS

Page

Issues Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Summary of Argument 7

Argument 8

Conclusion 19

Appendices ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Louisiana State Board of Dentistry, 543 So.2d 908 (La. 1989) 12, 13, 14, 15

Burrell v. Schlesinger, 459 So.2d 1195 (La. App. 4th Cir. 1984), *writ denied*, 463 So.2d 1320 (La. 1985) 18

Butler v. Department of Safety and Corrections, 609 So.2d 790 (La. 1992) 18

Evers v. Board of Medical Examiners, 516 So.2d 650 (Cert. to state supreme court quashed 1987)..... 12

Louisiana v. Dandridge, 614 So.2d 129 (La. App. 4th Cir. 1993) 18

Louisiana State Bar Association v. Frank, 472 So.2d 1 (1985) 10

Montalbano v. Louisiana State Board of Medical Examiners, 560 So.2d 1009 (La. App. 4th Cir. 1990)..... 18

Ogg v. Louisiana State Bar of Chiropractic Examiners, 602 So.2d 749 (La. App. 1st Cir. 1992) 15

Serian v. West Virginia Board of Optometry, 297 S.E.2d 889 (W.Va. 1981)..... 12

In Re Soileau, 502 So.2d 1083 (La. 1987) 18

Summerell v. Philips, 258 La. 587, 247 So.2d 542 (1971) 18

U.S. v. Halper, 109 S.Ct. 1892 (1989)..... 18

Washington State Medical Disciplinary Board v. Johnston, 663 P.2d 457 (Wash. 1983) 12

Withrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975)..... 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

LSA-R.S. 37:1260-91 2

LSA-R.S. 37:1261 19

LSA-R.S. 37:1285A 3

DEL. CODE ANN. tit. 24 § 1731 (1994) 3

GA. CODE ANN. § 43-34-37(a)(3) (1982) 3

N.C. GEN. STAT. § 90-14(a)(7) (1994) 3

OKLA. STAT. ANN. tit. 59, § 513 (West 1994) 3

TEX. REV. CIV. STAT. ANN. art. 4495b (West 1985) 3

WYO. STAT. § 33-26-508(a)(iv) (1977) 3

STATEMENT OF THE CASE

A proper understanding of Dr. Alexander's writ application to this Court requires a brief excursion into the factual history which lead this physician to this forum. On May 21, 1985, a robbery occurred at the Central Savings Bank on Canal Street in New Orleans yielding approximately $2,635.00 to the perpetrator. Shortly after the commission of this crime, Dr. Alexander was arrested and charged with bank robbery, after being specifically identified by three witnesses at the bank. Following an indictment and a full trial in the United States District Court for the Eastern District of Louisiana, Dr. Alexander was found guilty of the commission of this crime on March 21, 1986. On June 4, 1986, the Honorable Morey Sear, presiding judge, sentenced Dr. Alexander to five years imprisonment. This conviction was subsequently appealed by Dr. Alexander to the United States Court of Appeals for the Fifth Circuit which reversed the conviction, finding that it was error for the presiding judge to exclude certain testimony and other evidence sought to be utilized by the defendant at trial. Inasmuch as the record of this proceeding contains a copy of the opinion of the Fifth Circuit, it will not be addressed here, except to say that the principal basis of the Fifth Circuit's reversal was the exclusion of testimony of two defense witnesses who had conducted certain scientific and quasi-scientific analyses of photographs taken during the robbery and subsequent thereto.

Exercising its prosecutorial discretion, the United States Attorney's office again tried Dr. Alexander for the crime alleged on August 3, 1987. For the second time, a jury of Dr. Alexander's peers found him to be guilty of

bank robbery, and on February 24, 1988, Dr. Alexander was sentenced to three years imprisonment in the custody of the United States Attorney General. This second conviction was also appealed to the Fifth Circuit, but on March 28, 1989 the Fifth Circuit affirmed the conviction and judgment, thus bringing finality to Dr. Alexander's criminal proceedings.[1]

Following the Fifth Circuit affirmance of the second jury verdict and judgment of conviction, the Louisiana State Board of Medical Examiners initiated administrative proceedings against Dr. Alexander by the filing of an Administrative Complaint on or about April 13, 1989. This Administrative Complaint, a copy of which can be found in the administrative record filed with the district court, simply alleged that Dr. Alexander had been found guilty of robbing Central Savings and Loan Association of approximately $2,600.00 on or about May 21, 1986. The complaint further alleged that such conduct was a violation of the Louisiana Medical Practice Act[2] in that subsection A(1) of Section 1285 of Title 37 authorizes the Louisiana State Board of Medical Examiners to take disciplinary action against any physician for:

> Conviction of a crime or entry of a plea of guilty or nolo contendere to a criminal charge constituting a

---

[1] For the sake of completeness, the Court will note that a Petition for Certiorari was made to the United States Supreme Court by Dr. Alexander, which petition was denied.

[2] LSA-R.S. 37:1260-91

felony under the laws of Louisiana or of the United States.[3]

After a number of delays, a formal evidentiary hearing in this matter was conducted before the Board on July 20, 1989. Following that hearing and as required by Louisiana law, the Board rendered a Final Decision based upon explicit Findings of Fact and Conclusions of Law, finding that Dr. Alexander, had, in fact, been convicted of a felony under the laws of the United States and that such a conviction provided lawful cause for the suspension or revocation of Dr. Alexander's license to practice medicine in the State of Louisiana pursuant to LSA-R.S. 37:1285A(1).[4] Based on the authority cited in the referenced statute, the Board ordered that Dr. Alexander's license be suspended for a period of three (3) years from the date of the decision (August 1, 1989), but that the order of licensure suspension itself be suspended and stayed during Dr. Alexander's incarceration. The Board's

---

[3] LSA-R.S. 37:1285A(1). LSA-R.S. 37:1285A(a) does not require that the crime be related to the practice of medicine, provided that it is a felony. Cf. LSA-R.S. 37:1285A(2), which provides for licensure sanctions for crimes related to the practice of medicine, whether felony or misdemeanor. At least 7 other states have analogous statutes calling for professional discipline based on non-medical felonies. *See* TEX. REV. CIV. STAT. ANN. art. 4495b (West 1985); DEL. CODE ANN. tit. 24 § 1731 (1994); ILL. ANN. STAT. ch. 225, para. 22.A.3 (Smith-Hurd 1987); GA. CODE ANN. § 43-34-37(a)(3) (1982); WYO. STAT. § 33-26-508 (a)(iv) (1977); N.C. GEN. STAT. § 90-14(a)(7) (1994); OKLA. STAT. ANN. tit. 59, § 513 (West 1994). Oklahoma's rule is even stricter than Louisiana's, providing that the license of a physician or surgeon who has been convicted of any felony "shall be suspended or revoked and canceled." *Id.* (emphasis added).

[4] See Decision, attached hereto as Appendix A.

decision further provided that upon release from federal custody, Dr. Alexander would be allowed to engage in the practice of medicine at a health care institution approved by the Board, and would be reinstated to full, unrestricted licensure upon Dr. Alexander's successful completion of the special licensing examination (SPEX) of the Federation State Medical Boards of the United States. For all practical purposes, then, the Board did not exercise its authority to deprive Dr. Alexander of his medical license to any degree whatsoever; to the contrary, the Board only ordered a suspension of licensure during that period of time when Dr. Alexander was already in federal custody, and provided that he be allowed to return to the practice of medicine upon his release.

Subsequent to promulgation of the Board's Final Decision, an application was made by Dr. Alexander to reopen the matter on various grounds. After reviewing the arguments made in that application, the Board denied the request and appealed to the district court.

Following briefing and oral argument in 1990 in Section "H" of the Civil District Court for the Parish of Orleans, a Judgment was rendered by the Honorable Revius Ortigue, the effect of which was to order a remand of the case back to the Board for additional evidence regarding the issue of the physician's guilt. An appeal followed to Louisiana's Fourth Circuit Court of Appeals, which reversed Judge Ortigue and remanded the matter back to the district court for a ruling on the merits of Dr. Alexander's appeal.[5] In the interim between the ruling by

---

[5] *Alexander v. Louisiana State Board of Medical Examiners*, No. 91-C-1004 (La. App. 4th Cir. 1991). (Copy attached as Appendix B).

Judge Ortigue and the ruling by the Court of Appeal, this case was reassigned to Division I of the district court. In a decision rendered in open court on December 4, 1992,[6] the district court ruled in favor of the Board on the question of whether Dr. Alexander may be permitted to take additional evidence on the appropriateness of the Board's sanctions rendered in this case. The district court reserved the question whether Dr. Alexander was afforded full due process at the hearing before the Board, authorizing Dr. Alexander to take the deposition of Gregory Weiss, Esquire, who was the prosecutor in the administrative case before the Board. The purpose of the deposition was to permit Dr. Alexander's counsel the opportunity to establish evidence supporting her claim that prosecutorial misconduct on the part of Mr. Weiss during the formal evidentiary hearing abrogated Dr. Alexander's due process rights. The judgment further provided that Dr. Alexander could apply for leave of court to take additional depositions on the due process issue but no further testimony was taken or requested on behalf of Dr. Alexander.

Following submission of the transcript of Mr. Weiss' deposition, the Honorable Robin Giarrusso entertained briefs on the due process issue, taking the matter under advisement and subsequently rendering judgment and reasons for judgment on September 1, 1993, affirming the

---

[6] *Alexander v. Louisiana State Board of Medical Examiners*, CDC No. 90-23541. (Copy attached as Appendix C).

Board in all respects.[7] In pertinent part, Judge Giarrusso concluded:

> [T]he record fails to demonstrate that any of the questioned conduct by Mr. Weiss, including his comments to the Board concerning whether certain evidence should be proffered, ultimately made any difference in the outcome of the decision, or the manner that Dr. Alexander was handled procedurally by the Agency.

Appendix D.

Following the District Court's judgment, appeal was taken to the Fourth Circuit Court of Appeals, where all issues previously raised in the district court were presented anew by the appellant for this Court's consideration.

The Fourth Circuit Court of Appeals affirmed in a unanimous opinion dated September 29, 1994. See Appendix E. Dr. Alexander then refiled a petition for rehearing with the Fourth Circuit Court of Appeals, which was denied on November 15, 1994. Next, Dr. Alexander sought further review of the appeals court decision by the Louisiana Supreme Court via Writ of Certiorari, which was denied without reasons on February 9, 1995. A timely petition for a writ of certiorari to this court followed. It is respectfully submitted that the Board reached the only decision it could reasonably have reached under the facts of this case:

---

[7] See Judgment and Reasons for Judgment, attached hereto as Appendix D.

(1) Dr. Alexander was convicted (twice) for bank robbery, a felony;

(2) The Louisiana Medical Practice Act calls for the Board to impose disciplinary action against physicians who are convicted of felonies; and

(3) The Board did so, exercising a great deal of restraint in fashioning sanctions well short of the maximum penalty it could have imposed (revocation).

Dr. Alexander has successfully circumvented the discipline lawfully imposed by his peers for over five and one-half years to-date, through continued litigation and appellate proceedings. Yet, the appellant's contentions are truly without substance. It is respectfully submitted that the Board's decision should be affirmed and made executory without further delay.

SUMMARY OF ARGUMENT

The Louisiana State Board of Medical Examiners acted completely within its discretion in declining to admit into evidence certain defense exhibits solely relevant to the criminal defendant's guilt in its disciplinary proceeding against Dr. Alexander. According to Louisiana law, the Board is under no obligation to hear and consider "identification" evidence or other evidence relevant solely to the issue of a target's guilt, where guilt has been conclusively established by final conviction. Here, Dr. Alexander was a convicted felon, and his license was suspended on that basis alone. Therefore, the Board's refusal to consider other irrelevant evidence was not an unconstitutional deprivation.

The Board's decision is valid notwithstanding the claims of commingling of functions between the administrative prosecutor and the Board's legal counsel. State administrators enjoy a presumption of honesty and integrity. Here Dr. Alexander can demonstrate no bias or prejudice against him resulting from the alleged advisory role played by the prosecutor attorney. Without such a showing, it is plain that the Board lawfully imposed licensure sanctions upon Dr. Alexander in a manner consistent with due process.

The Board's imposition of sanctions against Dr. Alexander did not violate the double jeopardy prohibition of the Fifth Amendment. The sanctions are remedial rather than punitive, and therefore do not give rise to double jeopardy.

ARGUMENT

1. Whether the board acted within its discretion in declining to admit into evidence six (6) defense exhibits proffered by the appellant relevant solely to the criminal defendant's guilt?

The Board is under no obligation to hear and consider "identification" evidence or other evidence relevant solely to the issue of guilty, where guilt is conclusively established by final conviction.

The Petitioner argues, as he did in the courts below, that the Board committed reversible error in not considering certain identification evidence which had been introduced and argued (unsuccessfully) to both federal juries

in the criminal case.[8] The evidence at issue, then, was relevant solely to Dr. Alexander's defense of mistaken identity, and the material incorporated under tabs 4 through 9 of his hearing exhibits directly relate to presentation of that defense at the criminal trial. The Board, as an administrative agency, may exclude "immaterial, incompetent, or repetitious evidence." LSA-R.S. 49:956(1).

Review of the transcript of the Board's proceedings on July 20, 1989 demonstrates that while Dr. Alexander and his counsel acknowledge that evidence of an exculpatory nature is not relevant, repeated attempts are nonetheless made to introduce such evidence throughout the proceeding. Inasmuch as the felony conviction was the only basis for the Board's proceeding, evidence which went behind the conviction, so to speak, had no place at the hearing before the Board. Therefore, since the evidence had no relevance or bearing on issues properly before the Board at the hearing, it was clearly not erroneous for the Board to exclude it from evidence. Indeed, were it necessary for disciplinary Boards to entertain such evidence, it would have been required of complaint counsel to secure the opposing testimony of the three

---

[8] The disputed exhibits included tabs 4 through 9 of Dr. Alexander's hearing exhibits, which contained photographic exhibits, photographic comparisons, the trial testimony of a photographic expert, a report from a defense psychologist regarding the photographic line-up, a copy of the photographic line-up itself, and information on Dr. Alexander's financial status at the time of the robbery, which the defense used to argue that Dr. Alexander did not need the money he was convicted of stealing. All six exhibits were proffered by Dr. Alexander.

bank tellers who identified Dr. Alexander as the perpetrator of the crime. In essence, such a course of proceedings would result in degeneration of a simple evidentiary hearing before the Board into a retrial of the essential issues of guilt or innocence, which were decided finally by two federal court juries, two Fifth Circuit panels, and the United States Supreme Court when it denied Certiorari. The evidence excluded by the Board had no relevancy and would have lead the proceeding down a path clearly unwarranted and having no relationship to the issues at hand.

In arguing that the Board violated his due process protection in excluding the mistaken identity evidence, the appellant relies on a series of Louisiana State Bar Association cases involving attorney discipline. These matters, of course, involve an entirely separate and distinct set of jurisprudence, rules and procedures germane only to Bar Association proceedings. Nonetheless, reference to cases cited by Appellant does serve to illustrate the flaws in the appellant's argument. The appellant relies on the decision of *Louisiana State Bar Association v. Frank*, 472 So.2d 1, 2 (1985). In *Frank*, the involved attorney had been successfully prosecuted for interstate transportation of a counterfeit security, which required only that the government prove that the attorney had placed the security into interstate commerce when he knew or should have known that the security was counterfeit, as distinguished from what the court deemed a "substantive" offense, using the example of "forgery." *Id.* at 2. Since the crime involved in that matter was not "substantive" (i.e., constructive knowledge was enough to create technical guilt), the court could not obtain a true reading

on the defendant's culpability/moral turpitude without hearing additional facts.

Applying the court's reasoning to the instant matter, it is clear that the court would not have accepted in the disbarment proceeding, evidence of misidentification had the attorney been convicted of bank robbery rather than interstate transportation of counterfeit securities; bank robbery is surely as "substantive" as forgery would have been. Moreover, the court expressly observes that the Articles of Incorporation, State Bar Association, article 15, Section 8(7)(d) specifically limits a respondent in a disbarment proceeding to offering evidence of mitigating circumstances "which is not inconsistent with the essential elements of the crime." *Id.*, footnote 1. The court goes on to explain "the purpose of that rule is to prevent relitigation of guilt already determined in the criminal proceeding." *Id.* Clearly, misidentification evidence would be deemed wholly inconsistent with the "essential elements" of the crime of bank robbery. Therefore, were Dr. Alexander an attorney rather than a doctor, it is crystal clear that he would not have been permitted to re-parade his defense exhibits and testimony on the issue of misidentification. Therefore, using the true reasoning of the Louisiana Supreme Court in the authorities relied on by Dr. Alexander in this case, this Court should not disturb the Board's ruling.

2. **Whether the Board's decision must be overturned as a result of the alleged impermissible influence of the prosecuting attorney on the Board in its consideration of this case?**

The Board lawfully imposed licensure sanctions on the Appellant consistent with due process.

In *Withrow v. Larkin*, 421 U.S. 35 (1975), this Court held that a challenge to an administrative adjudication based upon bias due to some improper commingling of investigative and adjudicative functions must "overcome a presumption of honesty and integrity in those serving as adjudicators." 421 U.S. at 47. In *Withrow* this Court, while recognizing that administrative proceedings must strive to protect the due process rights of targets, nonetheless indicated its reluctance to proscribe every imperfectly separated proceeding, because "[t]he incredible variety of administrative mechanisms in this country will not yield to any single organizing principle." 421 U.S. at 52[9]. Petitioner's reliance, then, in alleging a failure of due process upon a perceived difference between the treatment of attorneys and the treatment of physicians subject to disciplinary investigation is misplaced.

Dr. Alexander's challenge here concerning separation of functions was based on the 1989 Louisiana Supreme Court decision in *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (La. 1989). The *Allen* decision has absolutely no application in the present instance. In *Allen*, the court held that it was constitutionally impermissible

---

[9] This case has been relied upon in several state decisions in rejecting claims of due process violation due to a commingling of functions in medical disciplinary proceedings. *See, e.g., Serian v. West Virginia Board of Optometry*, 297 S.E.2d 889 (W.Va. 1982) (where mixing of roles of prosecutor and judge did not violate due process); *Washington State Medical Disciplinary Board v. Johnston*, 663 P.2d 457 (Wash. 1983) and *Evers v. Board of Medical Examiners*, 516 So.2d 650 (Cert. to state supreme court quashed 1987) (where prosecutor also serving as legal counsel to board did not violate due process).

for an attorney prosecuting a case before the Dental Board to participate in the formulation and drafting of the agency's *final decision,* rendered after an evidentiary hearing. This decision of the Louisiana Supreme Court has no bearing on any issue in this case for at least two reasons: first, there is absolutely no evidence in the record that the prosecuting attorney before the Louisiana State Board of Medical Examiners had any hand whatsoever in the formulation and drafting of the Board's final decision.[10]

Secondly, there was no potential for bias in the Alexander proceeding. The Louisiana Supreme Court in *Allen* found the challenged conduct to be constitutionally impermissible because the final decision necessarily addressed innumerable issues of fact which were based upon the presentation of evidence at that evidentiary hearing. In the present instance, as the Court will quickly note from a review of the decision, there are no factual issues whatsoever. It is undisputed that Dr. Alexander was convicted of bank robbery in federal court. At the outset of the hearing before the Louisiana State Board of Medical Examiners, complaint counsel introduced certified copies of documents from the federal court record evidencing Dr. Alexander's conviction. No one disputes that the conviction occurred. Thus, any argument by Dr. Alexander that complaint counsel impermissibly swayed

---

[10] The prosecutor, Gregg Weiss, was never asked by the Appellant's counsel whether he participated in recording the Board's decision in this case; he was only asked about general procedures. In truth and in fact, Mr. Weiss had no role in the preparation of the *Alexander* decision and there is no evidence to the contrary.

the decision ultimately reached by the Board is ill-founded in fact and law. Indeed, for the Board not to have found that Dr. Alexander was convicted of a felony would have been nearly impossible. Because that was the only "factual" finding of any importance in the administrative proceedings in question, and further considering that complaint counsel certainly had no hand in the drafting of that final decision, Dr. Alexander's reliance on the *Allen* decision is misplaced and has no bearing on these proceedings.

In his deposition, Mr. Weiss essentially admits that he was in error when he advised the Board (in his role as an advocate) that evidence concerning Dr. Alexander's guilt or innocence should not be proffered. He also admits that he has in the past (pre-*Allen*) assisted in putting the Board's various decisions to paper after deliberations were completed, in the role of a law clerk or scribe. However, Mr. Weiss did *not* testify that he wrote the decision in the Alexander matter, and the record contains no evidence that he did write the decision. As the Appellant will readily acknowledge, however, the Board ultimately *did* accept the proffer, curing the error.

As Mr. Weiss testified, he perceived his advice to the Board as being in his capacity as an advocate, rather than as independent counsel to the Board. Regardless of the propriety of Mr. Weiss' action on that issue, it remains the fact that the proffer ultimately was accepted. There is no evidence in Mr. Weiss' deposition, or anywhere else in the record that in any way suggests that the Board improperly relied on any influence by Mr. Weiss or anyone else. Rather, the Board simply obeyed its statutory

duty and imposed appropriate disciplinary action based on Dr. Alexander's conviction of a felony.

Essentially, Dr. Alexander's argument is that Mr. Weiss' allegedly inappropriate conduct in arguing to the Board on the proffer issue amounted to acting as the Board's general counsel in a matter in which he was also the prosecuting attorney. A similar claim was raised by the professional who was disciplined in the decision of *Ogg v. Louisiana Board of Chiropractic Examiners*, 602 So.2d 749 (La. App. 1st Cir. 1992), in which the court declined to extend the principles in *Allen* to those suggested by Dr. Ogg. Dr. Ogg contended that the fact that the prosecuting attorney for the Board was also the Board's general counsel created a presumption of bias on the part of the Board, or alternatively, that the association created an appearance of unfairness. As in the instant case, the plaintiff has not established any specific misconduct on the part of the Board or the prosecuting attorney. The *Ogg* court held that:

> We do not believe that this allegation standing alone is sufficient to overcome the presumption of honesty and integrity of the Board in these proceedings, nor does it deprive the proceeding of the crucial appearance of fairness . . . [w]ithout a showing of some type of impropriety on the part of the attorney or the Board, we have no reason or authority to find this relationship constitutes a denial of due process.

In an apparent attempt to circumvent *Ogg*, the Appellant argues that Mr. Weiss had unauthorized *ex parte* communications with the Board after the hearing. Examination of the record, however, reveals that all Mr. Weiss did was

to "advise" the Board that he was withdrawing his previous objection to Dr. Alexander's attempted proffer, with advance notice to Dr. Alexander's counsel (who, of course, had no quarrel with this at the time since it was to Dr. Alexander's benefit). Regarding the issue, Mr. Weiss testified:

> Q. Okay. Mr. Weiss in your letter of August 14, you indicate that you had talked to Dr. Muslow regarding my request and that a motion would be made at the next board meeting.
>
> A. Yeah.
>
> Q. I take it that was an ex parte motion that you made or another attorney representing the medical board made?
>
> A. I probably would have made this motion myself.
>
> Q. Okay. It would be accurate to state I wasn't present at the medical board meeting which that motion was made –
>
> A. No, not that I recall.
>
> Q. – on behalf of Dr. Alexander?
>
> A. Not that I recall. But since it was my mistake in objecting, I certainly would have followed through and made the motion myself.
>
> Q. Do you recall whether or not you made any argument to the board or expressed any comments at the time you made this motion?
>
> A. The only comments I might have made would have been the comments of embarrassment.

Deposition of Gregory C. Weiss, pages 73-74. Clearly, Mr. Weiss' withdrawal of an objection following the hearing is not "ex parte communication" prejudicing Dr. Alexander. Rather, it was as an advocate humbling himself before the tribunal to acknowledge that his opponent had been correct on the proffer issue. Mr. Weiss was fulfilling his professional duty of candor, not trampling the constitutional rights of his opponent.

In short, there was no significant co-mingling of functions by the Board's prosecutor giving rise to any bias or denial of due process to Dr. Alexander. Mr. Weiss testified in his deposition concerning general practices prior to *Allen v. Louisiana State Board of Dentistry,* when the prosecuting attorney would, from time to time, serve as a scribe to record decisions made by the Board members following their deliberations. However, the simple fact is that Mr. Weiss did not write the final decision in this matter, so his testimony concerning general practices is of no relevancy. Moreover, the decision itself, including findings of fact and conclusions of law is so concise due to the simplicity of the issues at the hearing that it would make no difference who actually put the pen to paper. This was not a complex case. Dr. Alexander was convicted of a crime, and the Board imposed an appropriate penalty based on that conviction.

3. Whether the disciplinary action imposed by the Board in this matter was violative of the double jeopardy clause of the Fifth Amendment to the U.S. Constitution?

The statutes granting the Board the power to impose disciplinary action on licensees are constitutional. In his

brief, the Appellant raises, for the first time, the novel argument that the Board's decision violates the double jeopardy clause in the Fifth Amendment to the U.S. Constitution, relying on *U.S. v. Halper*, 109 S.Ct. 1892 (1989). In essence, this argument required examination of whether the Medical Practice Act, which authorizes imposition of various sanctions where a physician is convicted of a felony, is unconstitutional. This argument was not raised by the Appellant until the brief filed with this court. As such, the constitutional argument has been waived. *Montalbano v. Louisiana State Board of Medical Examiners*, 560 So.2d 1009, 1010 (La. App. 4th Cir. 1990) ("a litigant who fails to plead the unconstitutionality of a statute cannot legally raise the constitutional issue in the appellate court."); *Summerell v. Philips*, 258 La. 587, 247 So.2d 542 (1971); *Burrell v. Schlesinger*, 459 So.2d 1195 (La. App. 4th Cir. 1984), *writ denied*, 463 So.2d 1320 (La. 1985).

In any event, even if the statute were subject to appellate review at this stage, it is obvious that here, as in other instances of professional discipline, the sanctions are, by their nature remedial rather than punitive. Dr. Alexander was ordered to take the SPEX examination to establish clinical competency, not to punish Dr. Alexander. See, e.g. *Butler v. Department of Safety and Corrections*, 609 So.2d 790 (La. 1992) (suspension of driver's license in administrative proceeding did not constitute double jeopardy, even though motorist punished in DWI conviction as a result of same incident); *In Re Soileau*, 502 So.2d 1083 (La. 1987) (double jeopardy does not apply to disciplinary proceedings against a judge); and *Louisiana v. Dandridge*, 614 So.2d 129 (La. 4th Cir. 1993) (Administrative proceeding resulting in expulsion from school does

not constitute criminal prosecution so as to trigger double jeopardy).

CONCLUSION

Back in July, 1989, the Board quickly and efficiently issued a fair decision to Dr. Alexander, a physician licensed in Louisiana but who had been convicted of the crime of bank robbery and sentenced to incarceration in prison. Exercising its wide discretion, the Board fashioned licensure sanctions well short of the maximum restrictions, fashioning requirements focused on insuring clinical competency as required under LSA-R.S. 37:1261.

Through years of litigation and appeals, Dr. Alexander, with the assistance of his able counsel, has successfully circumvented the judgment of his peers. The time has come for the litigation to end, and for the court to afford the Board's decision the dignity it deserves.

Respectfully submitted:

ADAMS AND REESE
L. THOMAS STYRON
Bar No. 17821
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

APPENDIX A

EXHIBIT A

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

(SEAL)

830 Union Street, Suite 100
Telephone: (504) 524-6763
New Orleans, LA 70112-1499

In The Matter Of	:	No. 89-A-010
VICTOR ALEXANDER, M.D. (Certificate No. 05931R),	:	DECISION
Respondent.	:	———

An administrative hearing was convened before the Louisiana State Board of Medical Examiners (Board) on July 20, 1989, to adjudicate alleged violations of the Louisiana Medical Practice Act[1] by Victor Alexander, M.D., Respondent herein.[2] A quorum of the Board was present.[3]

---

[1] LA. REV. STAT. ANN. §§ 37:1261-1292 (West 1988 & Supp. 1989).

[2] By Administrative Complaint filed April 13, 1989, Respondent was charged with "[c]onviction of a crime . . . constituting a felony under the laws of Louisiana or of the United States. LA. REV. STAT. ANN. § 37:1285(A)(1) (West 1988).

[3] The hearing panel comprised Drs. Muslow, Bordelon, Laborde, Hackett, LaNasa and Kaplan. Dr. Nunnally took no part in the hearing, consideration or decision of this case.

Respondent was present and was represented by legal counsel.[4]

Upon consideration of the evidence admitted, pursuant to La. Rev. Stat. § 49:958, the Board renders the following findings of fact, conclusions of law and decision.

Findings of Fact

1. Respondent, Victor Alexander, M.D., is a physician duly licensed by the Board to practice medicine in the state of Louisiana.

2. Pursuant to a jury verdict rendered August 10, 1987, on February 24, 1988, in the United States District Court for the Eastern District of Louisiana, Respondent was found guilty and convicted of having, on May 21, 1985, robbed a Federally-insured New Orleans, Louisiana, savings and loan institution, in violation of 18 U.S.C. § 2113(a). Pursuant to such conviction, Dr. Alexander was sentenced by the court to a term of imprisonment of three years.[5] Respondent's conviction was affirmed by the United States Court of Appeals for the Fifth Circuit.[6]

3. Dr. Alexander does not currently suffer from any material or significant physical or psychological impairment

---

[4] Sheila C. Myers, Esq., New Orleans, Louisiana.

[5] Judgment and Probation/Commitment Order, *United States of America v. Victor Alexander*, No. 85-243 (U.S.D. Ct., E.D. La., Feb. 24, 1988).

[6] United States v. Alexander, 869 F.2d 808 (5th Cir., Mar. 28, 1989), *reh. denied*, 874 F.2d 812 (5th Cir., Apr. 27, 1989).

which compromises his ability to practice medicine with reasonable skill and safety to patients.

Conclusions of Law

Based on the foregoing findings of fact, the Board concludes, as a matter of law, that:

1. Violation of 18 U.S.C. § 2113(a) constitutes a felony under the laws of the United States.

2. By virtue of his conviction of a crime constituting a felony under the laws of the United States, lawful cause exists for the suspension or revocation of Respondent's license to practice medicine in the state of Louisiana, pursuant to La. Rev. Stat. § 37:1285(A)(1).

Decision

Considering the foregoing,

IT IS ORDERED that the license of Victor Alexander, M.D., to practice medicine in the state of Louisiana, as evidenced by Certificate No. 05931R, be, and the same is hereby, SUSPENDED for a period of three years from the date hereof.

IT IS FURTHER ORDERED that the foregoing order of suspension shall itself be SUSPENDED AND STAYED, effective as of the date on which Dr. Alexander may be released from Federal imprisonment, provided that, as an express condition of such suspension and stay, Dr. Alexander shall accept, strictly comply with and satisfy the following probationary terms, conditions and restrictions:

A. *Restricted Practice During Continuing Custody.* Following his release from incarceration, during such period as he may remain in Federal custody in a half-way house or similar setting, and thereafter until reinstatement of unrestricted licensure by the Board, Dr. Alexander shall not engage in the practice of medicine in any form in the state of Louisiana other than at a health care institution or program previously approved by the Board in writing. Subject to such approval by the Board, upon satisfactory evidence submitted by Dr. Alexander that he has been released from incarceration and has secured a position at a health care institution or program, the Board shall issue a restricted probational license to Dr. Alexander authorizing such restricted practice.

B. *Reinstatement of Unrestricted Probational Licensure.* As express, prior conditions to the Board's reinstatement of unrestricted medical licensure to Dr. Alexander shall have: (1) submitted satisfactory evidence of his final discharge from Federal custody; (2) taken and successfully passed the Special Licensing Examination (SPEX) of the Federation of State Medical Boards of the United States, as administered by the Board; and (3) made a personal appearance before the Board. Upon his satisfaction of such conditions, the Board shall issue an [sic] license to Dr. Alexander which shall be unrestricted as to his medical practice but shall be probational, and remain on probation, for a period of three years following the date of issuance of such license.

IT IS FURTHER ORDERED that Dr. Alexander shall be assessed and pay a fine to the Board in the amount of

Five Thousand and No/100 Dollars ($5,000.00); provided, however, that such fine shall be waived by the Board provided that Dr. Alexander successfully satisfies and complete the terms and period of probation ordered herein.

IT IS FURTHER ORDERED that any violation of the probationary terms, conditions and restrictions set forth herein shall be deemed just cause for the suspension or revocation of the medical licensure of Victor Alexander, M.D., or for such other disciplinary action as the Board deems appropriate, as if such violations were enumerated among the causes provided for by La. Rev. Stat. § 38:1285.

New Orleans, Louisiana, this 1 day of August, 1989.

LOUISIANA STATE BOARD OF
MEDICAL EXAMINERS

By: /s/ Ike Muslow
IKE MUSLOW, M.D.
President

APPENDIX B

EXHIBIT B

NO. 91-C-1004

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

VICTOR ALEXANDER

versus

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

In Re:	LOUISIANA STATE BOARD OF MEDICAL EXAMINERS
Applying for:	SUPERVISORY WRITS
Directed to:	HONORABLE REVIUS O. ORTIQUE, JR., JUDGE, CIVIL DISTRICT COURT, PARISH OF ORLEANS, DIVISION "H", NO. 89-23541

WRIT OF CERTIORARI GRANTED

The trial court's judgment of September 28, 1990 is vacated. The trial court abused its discretion in remanding this matter to the Louisiana State Board of Medical Examiners (Board) for the introduction of evidence regarding Dr. Alexander's felony conviction. LSA-R.S. 49:964(G); LSA-R.S. 37:1285(A)(1).

New Orleans, Louisiana, this 11th day of September, 1991.

/s/ DRMW
JUDGE DAVID R. M. WILLIAMS

/s/ JPMS
CHIEF JUDGE PATRICK M. SCHOTT

*Due to the death of Judge Rudolph F. Becker prior to rendition, but after his concurrence therein, this writ is rendered unanimously by Schott, C.J. and Williams, J.

APPENDIX C

EXHIBIT C

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 90-23541 DIVISION "~~H~~"G DOCKET NO.

VICTOR ALEXANDER, M.D.
PETITIONER-APPELLANT

VERSUS

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS
RESPONDENT-APPELLEE

FILED: _____ DEPUTY CLERK: _____

JUDGMENT

On December 4, 1992, argument was held on Petitioner-Appellant's request to present additional testimony in accordance with the provisions of LRS 49:964.

PRESENT: L. THOMAS STYRON, ESQ.
Attorney for the Louisiana State Board of Medical Examiners,
Respondent-Appellee

SHEILA C. MYERS, ESQ.
Attorney for Victor Alexander, M.D.,
Petitioner-Appellant

When after reviewing argument of counsel, the applicable law and the relevant facts, the Court finds that the law and evidence are in favor of the Petitioner-Appellant, Victor Alexander, M.D., on the issue of whether evidence may be presented on the due process issue; therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Petitioner-Appellant's request to present additional evidence under the provisions of LRS 49:964(F) is granted. Petitioner-Appellant is authorized to take the deposition of Gregory Weiss, Esq. and within thirty (30) days of the receipt of same from the Court Reporter is to notify this Court of his desire to depose any additional persons, requesting the Court's authority to do so.

In addition, when after reviewing the argument of counsel, applicable law and relvant facts, the Court finds that the law and evidence are in favor of Respondent-Appellee, the Louisiana State Board of Medical Examiners, on the issue of whether evidence may be presented on the arbitrariness of sanctions issue; therefore,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner-Appellant's request to present additional evidence under the provisions of LRS 49:964(E) is denied.

JUDGMENT READ, RENDERED AND SIGNED in New Orleans, Louisiana this 15 day of December, 1992.

/s/ Robin Giarrusso
JUDGE
CIVIL DISTRICT COURT
PARISH OF ORLEANS

A TRUE COPY
/s/ Marie McKay
DEPUTY CLERK, CIVIL
DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

APPENDIX D

EXHIBIT D

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 89-23541 DIVISION G DOCKET NO.

VICTOR ALEXANDER, M.D.

VERSUS

LOUISIANA STATE BOARD OF
MEDICAL EXAMINERS

JUDGMENT

This matter was submitted for decision on July 21, 1993.

For the written reasons assigned, the Court finds that the law and evidence are in favor of the defendant, Louisiana State Board of Medical Examiners and accordingly;

IT IS ORDERED, ÀDJUDGED AND DECREED that the Petition of Victor Alexander, M.D., be dismissed, that the stay entered herein be lifted, and the Board's August 1, 1989 decision be, and the same is hereby rendered executory, commencing on the effective date of this judgment.

JUDGMENT SIGNED, NEW ORLEANS, LOUISIANA, this 1st day of September, 1993.

/s/ Robin M. Giarrusso
JUDGE

A TRUE COPY
/s/ Marie McKay
DEPUTY CLERK, CIVIL
DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 89-23541 DIVISION G DOCKET NO.

VICTOR ALEXANDER, M.D.

VERSUS

LOUISIANA STATE BOARD OF
MEDICAL EXAMINERS

REASONS FOR JUDGMENT

This matter came before the Court on Petition for Judicial Review of an agency decision by the Louisiana State Board of Medical Examiners ("Board"), filed by and on behalf of petitioner, Victor Alexander, M.D. The matter was submitted for decision of the court on briefs filed by both parties on July 21, 1993. In addition to the briefs filed by the parties, the Court had available to it the complete administrative record as well as the record filed on appeal to date, including a transcript of the deposition of Gregory Weiss, who was the prosecuting attorney in the matter adjudicated before the Board.

The Court having previously ruled on December 4, 1992 that the law and evidence did not support petitioner's contention that the penalty imposed by the Board warranted modification, the issue left for decision by the Court is whether petitioner has established a case of prosecutorial misconduct under the due process principles espoused in Allen v. State Board of Denistry, 543 So.2d 908 (La. 1989).

Upon consideration of the briefs and arguments of counsel, the Court is of the opinion that the law and evdience are in favor of defendant, the Louisiana State Board of Medical Examiners, and that the petitioner's appeal should, therefore, be dismissed and the Board's August 1, 1989 decision be make [sic] executory. In short, the record fails to demonstrate that any of the questioned conduct by Mr. Weiss, including his comments to the Board concerning whether certain evidence should be proferred, ultimately made any difference in the outcome of the decision, or in the manner that Dr. Alexander was handled procedurally by the agency.

Essentially, the Louisiana Medical Practice Act, LSA-R.S. 37:1285 A(1) charges the Board with the authority to impose disciplinary action against a physician within its jurisdiction upon a determination that the physician has been convicted of a felony. The evidence in this case is undisputed that Dr. Alexander was convicted of a felony. Further, under the Medical Practice Act, the Board has the discretion to impose a full range of licensure sanctions, up to and including revocation. The Court notes that the penalty imposed on Dr. Alexander's medical license by the Board was significantly less severe than the maximum available.

SIGNED, NEW ORLEANS, LOUISIANA, this 1st day of September 1993.

/s/ Robin M. Giarrusso
JUDGE

A TRUE COPY
/s/ Marie McKay
DEPUTY CLERK, CIVIL
DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

APPENDIX E

VICTOR ALEXANDER, M. D.	**NO. 94-CA-0101**
VERSUS	**COURT OF APPEAL**
LOUISIANA STATE BOARD OF MEDICAL EXAMINERS	**FOURTH CIRCUIT STATE LOUISIANA**

* * *

AN APPEAL FROM THE CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS, NO. 89-23541, DIVISION "G" HONORABLE ROBIN GIARRUSSO, JUDGE

* * *

MIRIAM G. WALTZER JUDGE

* * *

(Court composed of Chief Judge Patrick M. Schott, Judge William H. Byrnes, III, and Judge Miriam G. Waltzer)

L. THOMAS TYRON
ROBERT J. CONRAD
Adams and Reese
New Orleans, Louisiana 70103
FOR DEFENDANT/APPELLEE

SHEILA C. MYERS
New Orleans, Louisiana 70130
FOR PLAINTIFF/APPELLANT

STATEMENT OF THE CASE

This is an appeal from a judgment of the Civil District Court for the Parish of Orleans, affirming a decree of the Louisiana State Board of Medical Examiners (Board)

imposing certain disciplinary sanctions against appellant, Victor Alexander, M.D. (Alexander).

In 1985, Alexander was indicted by a grand jury in the United States District Court for the Eastern District of Louisiana, and was in 1986 convicted by a jury in that Court of having robbed a federally-insured savings and loan association of over $2,000, a felony violation of 18 U.S.C. § 2113(a). That conviction was reversed[1] based on the trial court's refusal to admit certain expert testimony concerning the identification of Alexander as the bank robber. Alexander was re-tried and once again convicted by a federal court jury, and this conviction was affirmed.[2]

Following the action of the federal appellate court in 1989, the Board filed an Administrative Complaint against Alexander pursuant to LSA-R.S. 37:1285, which provides in pertinent part:

A. The board may . . . suspend or revoke any license . . . , or impose probationary or other restrictions on any license . . . issued under this Part for the following causes:

Conviction of a crime . . . constituting a felony under the laws . . . of the United States . . .

C. The board may, as a probationary condition, or as a condition of the reinstatement of any license or certificate suspended or revoked hereunder, require the license or permit holder to pay all costs of the board

---

[1] *United States v. Alexander,* 816 F. 2d 164 (5th Cir. 1987).

[2] *United States v. Alexander,* 869 F. 2d 808 (5th Cir. 1989), rehearing and rehearing en banc denied 27 April 1989; certiorari denied 493 U.S. 1069, 110 S. Ct. 1110, 107 L. Ed. 2d 1018 (1989).

proceedings, . . . , and to pay a fine not to exceed the sum of five thousand dollars.

Following an administrative hearing at which Alexander was represented by counsel, the Board rendered Findings of Fact and Conclusions of Law, finding Alexander to be a duly licensed physician who had been found guilty and convicted of a felony under the laws of the United States. By virtue of the Board's findings, it suspended Alexander's license to practice medicine in Louisiana for three years from the date of the judgment, 1 August 1989. The Board further ordered the suspension suspended and stayed effective as of the date on which Alexander would be released from federal prison, subject to the following probationary terms, conditions and restrictions:

A. Until reinstatement of unrestricted licensure by the Board, Alexander's practice would be limited to an institutional setting or program previously approved by the Board in writing;

B. As express, prior conditions to reinstatement of unrestricted medical licensure to Alexander, he shall have:

1. submitted satisfactory evidence of final discharge from Federal custody;

2. taken and successfully passed the Special Licensing Examination (SPEX) of the Federation of State Medical Boards of the United States, as administered by the Board; and

3. made a personal appearance before the Board.

C. Alexander would remain on probation for a period of three years following the issuance of the unrestricted license.

D. Alexander would pay a fine of $5,000, which fine will be waived provided that Alexander successfully satisfied and completed the terms and period of probation ordered by the Board.

Alexander applied to the Board to reopen the hearing, which application was denied.

Alexander appealed the Board's ruling to the Civil District Court for the Parish of Orleans which stayed the effect of the Board's decree and remanded the case to the Board, essentially for the relitigation of Alexander's conviction. On an application for writ of review, this Court reversed, finding the trial court abused its discretion in remanding the case to the Board. The Louisiana Supreme Court denied Alexander's writ application.

The trial court ruled on 4 December 1992 that the law and evidence did not support Alexander's contention that the penalty imposed by the Board should be modified. On 15 December 1992, the trial court entered judgment allowing Alexander to present additional evidence the deposition testimony of Gregory Weiss, the Board's prosecutor, in order to address Alexander's remaining claim of prosecutorial misconduct. The deposition was taken, the case was submitted on 21 July 1993, and judgment was rendered on 1 September 1993, dismissing Alexander's petition, making the Board's decision executory and lifting the stay. The trial judge found that the record failed to demonstrate that any of the questioned

conduct by the prosecutor, including specifically his comments to the Board on evidentiary matters, ultimately made any difference in the outcome of the hearing or the procedure by which Alexander's claim was handled by the agency. In its reasons for judgment, the trial court found:

"Essentially, the Louisiana Medical Practice Act, LSA-R.S. 37:1285 A(1) charges the Board with the authority to impose disciplinary action against a physician within its jurisdiction upon a determination that the physician has been convicted of a felony. Further, under the Medical Practice Act, the Board has the discretion to impose a full range of licensure sanctions, up to and including revocation. The Court notes that the penalty imposed on Dr. Alexander's medical license by the Board was significantly less severe than the maximum available."

SCOPE OF REVIEW

This Court's review of the action taken by the Board is "limited to a determination of whether the decision was unreasonable, arbitrary or capricious or amounted to an abuse of discretion." *Montalbano v. Louisiana State Board of Medical Examiners*, 560 So. 2d 1009, 1011 (La. App. 4th Cir. 1990). Further, we must be cognizant of the "Strong presumption of validity and propriety in such administrative actions where casting judgment upon the professional behavior of a fellow member of a profession is a matter peculiarly within the expertise of an agency composed of members of that profession." *Id.*, citing *Wilcox v. Louisiana State Board of Medical Examiners*, 446 So. 2d 502 (La. App. 4th Cir. 1984), writ denied, 450 So. 2d 359 (La. 1984); *Fisher v. Louisiana State Board of Medical*

Examiners, 352 So. 2d 729 (La. App. 4th Cir. 1977), writ denied, 353 So. 2d 1338 (La. 1978).

ALEXANDER'S SPECIFICATIONS OF ERROR

1. Alexander was denied due process in his hearing before the Board when the Board utilized the same attorney prosecuting the case on behalf of the Board in the capacity as legal counsel to the Board rather than obtaining the legal advice of outside independent legal counsel.

Alexander rests this specification on three incidents he contends illustrate such a dual capacity on the part of Mr. Weiss.

The hearing was held after Alexander's conviction had been affirmed by the United States Court of Appeal for the Fifth Circuit, but while his application to the United States Supreme Court for a writ of certiorari was pending. During the hearing, Weiss argued to the Board that Alexander's conviction was "final." In light of the fact the Alexander's counsel had agreed to formally waive any technical objection based on the finality of the federal court conviction, Weiss' argument, whether characterized as argument of counsel or as advice to the Board, was moot.

The second incident relied on by Alexander occurred when Weiss interrupted Alexander's counsel's argument to the Board that it was required to re-examine the factual basis for Alexander's conviction. At that time, Weiss stated:

"I'm going to have to interrupt you right here. I'm going to cut you short. I apologize for interrupting you. I apologize for interrupting your statement, Miss Myers, but that is incorrect."

Alexander contends that this interruption shows that Weiss was acting as general counsel to the Board. We find Weiss' comments to be consistent with his position as prosecutor before the Board. As an advocate, Weiss argued, essentially, that the issue before the Board was not whether Alexander was guilty of a federal felony (as to which the proffer might have probative value), but, under the Board's statutory grant of authority, whether Alexander had been convicted of a federal felony (as to which the proffer was irrelevant).

The third basis asserted by Alexander arises out of a post-hearing letter written by Weiss to the Board concerning Alexander's proffer of certain exculpatory evidence from his federal trial. At the Board hearing, Weiss had objected both to the admission of the evidence and to its acceptance as a proffer. Following correspondence between Weiss and counsel for Alexander, Weiss acknowledged that the questioned material would be made a part of the administrative record, and the material was received as a proffer.

As authority for his contention that these three incidents constitute prosecutorial misconduct that violated Alexander's right to due process in the administrative hearing[3], Alexander cites *Allen v. Louisiana State Board of*

---

[3] The guarantee of due process provided in the 14th amendment to the United States Constitution and in the

Dentistry, 543 So. 2d 908 (1989), modified on rehearing June 29, 1989, and *Mack v. Florida State Board of Dentistry*, 430 F. 2d 862 (5th Cir. 1970), certiorari denied 401 U.S. 954, 91 S. Ct. 970, 28 L. Ed. 2d 237 (1971) and 401 U.S. 960, 91 S. Ct. 971, 28 L. Ed. 2d 245 (1971) . Neither case requires the conclusion that the Board's action was unreasonable, arbitrary or capricious or amounted to an abuse of discretion.

The issue in *Allen* was whether the involvement of the prosecutor, Wootan, in the preparation of the committee's findings of fact and conclusions of law violated Allen's due process rights. In Allen, the Court found that the "testimony of . . . members of the panel clearly indicates the committee members never even arrived at detailed findings and conclusions. They delegated this task to Wootan in his role as counsel to the Board." *Allen, supra*, at 913. Indeed, the prosecutor's assistant testified she used no findings by the committee in preparing the draft findings and conclusions. Because the Court found that Wootan had indeed supplanted the committee's role as finder of fact, it concluded that Allen's due process rights had been violated. The record of the instant case is barren of such proof. The findings and conclusions in this case were succinct: that Alexander was a physician licensed to practice in Louisiana and that he had been convicted of a felony under the laws of the United States

---

Louisiana Constitution, Article I, § 2, applies to administrative proceedings. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); *Ensenat v. Louisiana State Bd. of Medical Examiners*, 593 So. 2d 929, 933 (La. App. 4th Cir. 1992).

were the sole elements required to be found in order to authorize imposition of sanctions under the Medical Practice Act.

The combination of investigative and judicial functions within an agency was upheld in *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). The Supreme Court set out the burden of proof where a plaintiff asserts that the combination of these functions creates an unconstitutional risk of bias, requiring that the plaintiff:

"overcome a presumption of honesty and integrity in those serving as adjudicators and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden." *Withrow, supra*, 95. S. Ct. at 1464.

In this case, the Medical Practice Act does not require or permit the Board to ascertain the correctness of the actions of the federal grand and petit juries or of the Fifth Circuit Court of Appeal or of the United States Supreme Court. The statute asks only whether Alexander was, in fact, convicted of a felony under the laws of the United States or the State of Louisiana. The risk of bias in a case such as this, where the ultimate facts are not in dispute, is non-existent. Had Alexander not been convicted of a felony, his appeal rights fully protect him from the result of an animus on the part of the Board that would have found conviction where there had been none. In this case, the fact of conviction is amply supported by the record and by the reported case in which Alexander was defendant.

Neither does the Mack case support the result Alexander seeks. The Mack court found plaintiff's due process rights to have been violated by a proceeding in which the counsel for each party "indulged in continuous personal acrimony, charges and countercharges, attacking each other with unconcealed venom, both as to their personal attributes and their professional competency . . . To get down to brass tacks, this was not a hearing. It was an ungoverned confrontation." Mack, supra at 864. The Court specifically said it did not intimate that the Constitution required selection of a competent attorney to, essentially, act as a neutral referee, but held that Mack's "hearing" was too disruptive and acrimonious to constitute a proper hearing within the meaning of due process.

There is no allegation that Alexander's hearing was held in such an atmosphere; indeed, a review of the record shows that the counsel for Alexander and the prosecutor, while strong and able advocates for their respective postitions, were respectful and polite in their remarks, and the proceedings were serious and decorous.

We do not find that the actions complained of, when viewed against the jurisprudential background, require a conclusion that Alexander's rights to due process in this administrative proceeding were violated. This specification of error is without merit.

2. The Board erred in refusing to admit "Profer 1."

"Profer 1" contained exculpatory identification evidence and information concerning Alexander's financial

status that had been a part of Alexander's defense in his federal trial.

Alexander contends that the Board's refusal to admit this evidence was erroneous and taints the Board's findings, relying by analogy on *Louisiana State Bar Ass'n v. Frank*, 472 So. 2d 1 (1985). Alexander alleges that the Board was prevented from having all the background data necessary to administer a fair disciplinary sanction. We believe that Alexander's reliance on Frank is misplaced. The Louisiana Supreme Court held that the facts underlying Frank's conviction for interstate transportation of a counterfeit security (rather than a substantive offense such as forgery) were extremely important in the determination of appropriate discipline, holding;

"The Facts upon which the conviction was based should be presented in some manner . . . at the hearing . . . so that the commissioner and this court will have the information available for use in the determination of discipline. This information is particularly useful when the conviction was in a federal court or a court of another state and the crime **was not a substantive one which parallels a crime defined by Louisiana law.**" *Frank, supra* at 2 (emphasis added).

The Court found that because the government was required to prove only that Frank caused the security to be placed in interstate commerce when he knew or should have known it to have been counterfeit made it "important to review the evidence produced at the criminal trial before discussing the appropriate discipline." *Id.*

Alexander's crime was bank robbery, and his participation as set forth in his conviction was patent. The considerations of intentional participation and possible

varying degrees of moral culpability present in *Frank* are absent in the case at bar. This specification of error is therefore without merit.

3. The penalty imposed on Alexander was arbitrary and capricious and violative of the prohibition against double jeopardy.

Alexander contends that the penalty imposed by the Board constitutes double jeopardy under the standard of *U.S. v. Halper,* 490 U.S. 435, 448-449, 109 S. Ct. 1892, 1901-1902, 104 L. Ed. 2d 487 (1989).[4] In *Halper,* the Court struck down as disproportionate and violative of Double Jeopardy a civil penalty of $130,000 under the False Claims Act where the Government's expenses approximated $16,000, holding:

"[T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment . . . We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that

---

[4] If this argument is interpreted as an attack on the constitutionality of the Medical Practice Act, it has been waived by Alexander's failure so to plead below. "A litigant who fails to plead the unconstitutionality of a statute cannot legally raise the constitutional issue in the appellate court." Montalbano v. Louisiana v. Louisiana State Board of Medical Examiners, 560 So. 2d 1009, 1010 (La. App. 4th Cir. 1990).

the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."

The Court recognized that the inquiry is "not an exact pursuit." Clearly, the Board may tailor a remedy that will compensate it for its own costs in the investigation and prosecution of the matter. As further guidance to this court of review, the Supreme Court held:

"We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment." *Halper, supra,* 490 U.S. at 450, 109 S. Ct. at 1092.

In the instant case, the $5000 fine is conditional and will not be imposed provided that Alexander fulfills the conditions of his probation as set forth in the Board's decree: restricted practice while in custody, evidence of final discharge from federal custody, passage of the Special Licensing Examination of the Federation of State Medical Boards of the United States, as administered by the Board, and a personal appearance before the Board. We find that the court did not abuse its discretion in failing to find that this conditional fine, under the circumstances of this case, violated Alexander's privilege against Double Jeopardy.

We find the trial court did not err when it failed to find the Board's decree to be arbitrary and capricious. The imposition of a requirement that Alexander demonstrate, by taking and passing the SPEX, that his skills as a physician had not been deteriorated during the period of his trials, appeals and incarceration is clearly within the

Board's authority and is designed not to punish Alexander, but to protect the whom he may seek to serve. Alexander's third assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the judgment of the Civil District Court for the Parish of Orleans dismissing the petition of Victor Alexander, M. affirming the decree of the Louisiana Board of Medical Examiners and lifting the stay of that decree is affirmed

AFFIRMED